

\*     **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on February 19, 2008

Pronounced on April 07, 2008

+     **IA No.1604/1999 in CS(OS) 2167/1993**

SH. AJIT SINGH

..... Plaintiff

Through Mr. Madan Bhatia, Sr. Advocate  
with Mr. M.L.Bhargava, Advocate

versus

SMT.ADARSH KAUR GILL

..... Defendant

Through Mr. C.A.Sundaram, Sr. Advocate  
with Ms. Malavika Rajkotia and Mr. Bandan Kumar,  
Advocates

Coram:

Mr. Justice S. Ravindra Bhat

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|----|---|-----|
| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not?                                | Yes |
| 3. | Whether the judgment should be reported in the Digest?                | Yes |

**Mr. Justice S. Ravindra Bhat:**

1.     This order will dispose off IA No. 1604/99 moved under Order VII Rule 11 of the Code of Civil Procedure, 1908 (hereafter “the CPC”) through which the Defendants seek an order rejecting the plaint. The defendant has sought for rejection of this suit on the ground

that it is barred in law, as the claims are time barred.

2. The plaintiff, in the present suit, has sought the following reliefs:

- a) *Pass a preliminary decree of partition of the property bearing No.3, south end Road, New Delhi, more particularly shown ion the plan, and, thereafter, pass a final decree partitioning the said property by mete and bounds and put each of the parties to the suit in actual physical possession of the portion of the property allotted to him/her. If the partition of the property by metes and bounds is not feasible, then the property by metes and bounds is not feasible, then the property may ordered to be sold by public auction through Court and proceeds thereof be divided between the parties to the suit in accordance with their share and entitlement;*
- b) *Pass a preliminary decree for partition of the movable assets belonging to the estate of Smt. Abnash Kaur, as mentioned in the Schedule to the plaint and, thereafter, pass a final decree and give to each of the party to the suit his/her share of the said property. In case it is not feasible to distribute the movable assets belonging to the estate of Smt. Abnash Kaur in the in the hands of defendants Nos.1 & 2 to each of the beneficiaries, as per the share and entitlement, then the said movable assets may be ordered to be sold by public auction through this Hon'ble Court and the proceeds thereto may be divided amongst the parties, as per their share and entitlement;*
- c) *Pass a decree for rendition of accounts and enquiry into the same with respect to the rental income of the property received by defendant NO.1 from the tenant of property bearing No.3, south End Road, New Delhi, w.e.f. 1.1.1980 to 30.11.1990;*
- d) *Pass a decree for rendition of accounts and enquiry into the same with respect to the profits made by defendant Nos. 1 & 2 from the business which they have been carrying on by investing the funds from the estate of Smt. Abnash Kaur;*
- e) *Pass a decree for declaration that there has been no lease deed executed by Smt. Abnash Kaur in favour of Defendant No.1 and that defendant No.1 is not a lessee in the property, 3, South End Road, New Delhi, and she is not entitled to give the said property to any person on sub-lease basis;*

- f) *Pass a decree of declaration to the effect that defendant No.1 is not a subrogee of the mortgage deeds executed by late Smt. Abnash Kaur with respect to the property in favour of Smt. Sushila Daphtary and her son Mr. Anil Daphtary said mortgage deeds have been redeemed out of the estate left by Smt. Abnash Kaur.*
- g) *Pass a decree of declaration to the effect that defendants Nos.1 & 2 have dis-entitled themselves from getting any share in the estate left by Smt. Abnash Kaur and that the plaintiff and defendants No.3, 4 and 5 are the only beneficiaries under the Will of Smt. Abnash Kaur and are entitled to get the entire estate left by Smt. Abnash Kaur divided and partitioned in four equal shares;*
- h) *Pass a decree for permanent injunction against Defendant No.1 restraining her permanently from transferring, alienating, letting out or parting with the possession of the property, 3 South End Road, New Delhi, or any part thereof and from making any additions and alterations in the same in any manner whatsoever.*
- i) *Any relief which this Hon'ble Court may deem fit and proper in the circumstances of the case may also be granted to the plaintiff and other beneficiaries under the Will of Smt. Abnash Kaur."*

3. The plaint may be summarized as follows. One Ms. Abnash Kaur was the Plaintiff's elder sister, as also of the first and third Defendants, mother of the fifth defendant and the aunt of the second and fourth defendant. She was married to one Mr. Shiva Prasad, who had, it is averred, given cash running into several lakhs of rupees and jewellery as gifts, in addition to the amount paid by him for running the household. It is submitted that he transferred the shares in Lord Krishna Mills Ltd. in her name as consideration for the marriage. It is also averred that out of the said amounts she purchased property No. 3, South End Road, New Delhi in 1956 for a total consideration of Rs. 2, 50, 000 and the sale deed was duly registered.

The present suit is being filed in relation to this property.

4. It is averred that Smt. Abnash Kaur was in exclusive possession of the said property and was residing therein, until it was handed over to the Vietnam Embassy on rental basis in the name of her sister-the first Defendant. A part of the property was also rented out to Lord Krishna Sugar Mills Ltd. in the year 1956. In the year Mr. Shiva Prasad passed away leaving behind Abnash Kaur, the fifth Defendant - her minor son, and seven sons from the first marriage as his only heirs. It is also alleged that the sons from the first marriage fraudulently obtained her signatures, came into complete control of the Mill and misappropriated huge sums of money. She informed them that she would not tolerate the mismanagement of funds, objected to the HUF status given to the estate of the deceased and threatened legal action for winding up the company. She also informed them that along with her son and the step sons she would have claim to the property and each of the nine people were entitled to 1/9<sup>th</sup> share in the property.

5. It is also averred that when she refused to stand guarantee for the company, being one its directors, Mr. Seth Bimal Pershad and his brothers (her stepsons) tried to pacify her by assuring her that the company would be managed by a committee of which she would be a part and no decision would be taken without consulting her. They also clarified that they had fraudulently obtained her signatures to ensure that no estate duty was to be paid on the their father's estate, and that they were aware that she was the exclusive owner of the of the said

property in South end Road as well as precious jewellery and other amounts lying in the bank accounts and lockers. Through a letter dated 14<sup>th</sup> April 1958 it was also agreed that all of them were entitled to 1/9<sup>th</sup> share in the deceased's property, pursuant to which Ms. Abnash Kaur signed the bank guarantee required by the bankers of the company.

6. It is submitted that after the death of Seth Bimal Pershad in 1959, his brothers did not adhere to the aforesaid arrangement and continued to embezzle the Company's funds, using various devices. When Abnash Kaur threatened to initiate winding up proceedings and take legal steps to protect her, and her son's interest in the estate, they retaliated by threatening her to initiate proceedings claiming the existence of a "Seth Shiv Prasad HUF", which included the properties exclusively owned by Abnash Kaur. To meet legal and other expenses, she decided to construct a floor on the aforesaid property and for financing the same, she mortgaged the said property in favour of Sushila Daphtary and Anil Daphtary, by mortgage deeds dated 19.1.1959 and 24.2.1959, for a sum of Rs. 1, 98, 000. At the time of the said mortgage she was residing in the property along with her son and other family members. The said property along with the additional construction, the furniture and other household items were insured by Abnash Kaur for a total value of Rs. 2, 50, 00 for a year. This insurance policy also noted that she was in exclusive possession of the said property in November 1959.

7. It is submitted that while Ms. Abnash Kaur was contemplating seeking permission from various authorities, to construct the first floor. After having obtained the necessary finances, on 11<sup>th</sup> July 1960 officials from the Recovery Department of the District Collection Officer, Delhi visited the property for attaching it towards the recovery on Income Tax amounting to Rs. 23, 37, 547.45 from the alleged Seth Shiv Prasad HUF. In order to overcome the situation it was agreed by Abnash Kaur, the first and third Defendants, in the presence of lawyers, that the said property would be shown as being let out to the two aforesaid defendants with a right to sub-let the same. Later, it was decided that the lease would be in favour of the first defendant only. Cash and jewellery were also similarly entrusted to the first Defendant. It is admitted by the Plaintiff that no lease deed was filed as part of the objection before the District Collection Officer nor were any placed before the Income Tax Officer at Meerut.

8. Abnash Kaur received a notice whereby her step sons alleged that the said property belonged to the pool of properties in the HUF and objected to her mortgaging it. Perturbed by the notice she filed a winding up Petition in relation to the company which was contested by her step sons. It is submitted that the property was given on a leave and license basis to the Vietnam Embassy on behalf of Abnash Kaur by the first Defendant. In order to overcome the legal hurdles, she was advised to make the said lease in favour of the first Defendant on a stamp paper prior to 1959 which was accordingly procured and the leased deed prepared.

The Plaintiff also submits that the lease deed in favour of the first Defendant was a sham and was done only to overcome the attachment of the said property and the movables in it. This deed, it is submitted, remained in the possession of Abnash Kaur and the possession of the said property also was never transferred to the first defendant. It is also averred that Ms. Abnash Kaur had been receiving the rent from the Vietnam Embassy. At the time of the lease it was also agreed in writing by the first Defendant that she would never lay a claim to the said property and that she would never deal with property in any manner without the leave of Abnash Kaur. Meanwhile, several rounds of litigation were going between the Abnash Kaur and step sons in relation to the said property.

9. It is also submitted that the Ms. Abnash Kaur entered into an agreement in 1963 for sale of the said property to Jaswant Rai for a consideration of Rs.9,35,000/-. It was disclosed to the purchaser that there was sham lease deed in respect of the property and that the property was also mortgaged. In 1963, the mortgagees filed a suit in which a compromise decree was passed, and the mortgage redeemed in favor of the first Defendant. This was done to increase the charge of the first Defendant on the property, since the allegedly fake lease deed was still valid, and this was necessary in order to thwart the claims in the suits pending between the step sons and Abnash Kaur. The property was later leased out to the Embassy of the German Democratic Republic.

10. The Plaintiff also mentions instances of various Income Tax Returns filed by the first

Defendant and Abnash Kaur to submit that rent from the said property was being given to Abnash Kaur and not to the first Defendant. Reliance was also placed on the records submitted during the various rounds of litigation between Abnash Kaur and her step sons. It is also submitted that the Plaintiff acted as the first Defendant's General Power of Attorney in collecting rents from the Embassy of the GDR and especially when the first Defendant had been abroad to settle differences with her husband. Further, it is submitted that the first Defendant never claimed the rents from the property since she knew that the entire lease deed was sham.

11. While drawing up her will on 6<sup>th</sup> February 1993, Abnash Kaur was advised not to disclose the investments made by her in the name of the first Defendant. It is submitted, that she was further advised to write, in her will about a lease agreement between herself and the first Defendant in relation to the said property. The will was also signed by the first Defendant among others, wherein they undertook that all assets movable and immovable belonged to Abnash Kaur and they would not be entitled to any share as a beneficiaries, in the event anyone claimed ownership of the assets. It is submitted that since the Plaintiff was familiar with the aforesaid arrangement and had been looking after the estate of Abnash Kaur he was named the administrator and executor of the will. It is further submitted that the first Defendant conspired with the advocate of Abnash Kaur to claim that she was the subrogee in terms of the compromise decree passed in the suit filed by the mortgagees and that the



lease deed was in fact a valid one, whereas the property was redeemed in the name of the first Defendant in order to avoid complications in proceedings filed by the step sons (of Abnash Kaur) which were pending at the time of the compromise. It is also submitted that the payment made to the mortgagees were in fact from the estate of Abnash Kaur. The Plaintiff further avers that the Will, and other documents are in the possession of the advocate of Abnash Kaur, Mr. GC Mittal and that he was unwilling to return them. However, the Plaintiff served a notice to Mr. Mittal after coming to know that he and the first Defendant had received huge sums of money from the Embassy of GDR in lieu of compensation for the said property. After coming to know that the leave and license agreement in favour of the GDR embassy was renewed, the Plaintiff served a notice on the first Defendant as well as the Embassy authorities that under the Will of Abnash Kaur there were six beneficiaries and that he was entitled to recover all profits on account of his being the administrator and executor of the will. Further, he also notified the embassy that the first defendant being a non resident Indian no property could be leased out by her. Through the notice, the first Defendant was asked to render accounts of the amounts received by her and to desist from entering into fresh agreement in relation to the said property. A copy of the said notice was also served on the other defendants. It is submitted that the Embassy, disregarding the aforesaid notice, further renewed the leave and license agreement. The plaintiff also points out to the affidavit filed by him and the fifth Defendant in Suit No. 2084/1980 disclosing the actual state of affairs in

relation to the said property and the benamidar status of the first defendant.

12. It is averred that in September 1980 the plaintiff, as the administrator and executor of the will, had made relevant disclosure under the Amnesty Scheme before the Income Tax Commissioner, Delhi disclosing the facts in order to save income accruing from Abnash Kaur's estates. He also disclosed the transactions entered into between the first Defendant and the Embassy. In the appeals preferred against the order of the ITO concerning the above disclosure, the Plaintiff submitted the list of jewellery which belonged to Abnash Kaur and also alleged that the first Defendant had made insufficient disclosure in this regard while filing her wealth tax returns. He further alleged that all businesses started by the first Defendant in India and abroad were from the funds of the estate of Abnash Kaur and that it was evident from the income tax returns filed by the first Defendant during the period 1966-1979 that she had no wealth whatsoever in her hands in the form of cash or any other property. The Income Tax authorities, pursuant to these applications ordered a investigation.

13. It is also submitted that due to the legal hassles created for the first Defendant and other interested parties including the Plaintiff, in February 1991 the Plaintiff and the first defendant agreed to settle the disputes. The terms for settlement allegedly given by the first Defendant are reproduced in the suit; they are as follows :

*"a ) All the beneficiaries should agree that there is no dispute about the rental income of the property 3 South End road, New Delhi, upto December 1979, as the entire rental income was received by Smt. Abnash Kaur in my*

*name, either through me or through you, on the basis of the General Power of Attorney executed by me in your favour on the asking of Smt. Abnash Kaur, through Smt. Abnash Kaur had been showing the said rental income in my income tax and wealth tax returns.*

*b) I have received the rental income of South End Road with effect from 1.1.1980 to 31.10.1990 and I agree to render the account of the same. I also agree to pay due share to all the beneficiaries of the said rental income. The rental income will be calculated on the basis of the agreements executed between me and the G.D.R. Embassy for the abovesaid period. I shall produce the said agreements for calculating the rental income. The amounts paid by me to the Income Tax Department after the death of Smt. Abnash Kaur, on the rental income of 3 South End road, which has been shown either in my income tax returns or in the wealth tax returns, shall be deducted from the rent received by me with effect from 1.1.1980;*

*c) I will not claim any charge on the property 3 South End Road for the two mortgages redeemed in my name from Smt. Shushila Daphtary and Mr. Anil Daphtary, as the amounts paid for redeeming the said mortgages were paid from the estate of Smt. Abnash Kaur.*

*d) The possession of property 3 South End Road has been taken by me from the G.D.R. Embassy on 1st November, 1990. I will continue to stay in the property upto 30th November, 1992, as I have to alternative arrangements for residence as per my requirements and thereafter I will surrender the possession of the property to you for effecting partition. I will not encumber or part with the possession of the property to any body in any manner nor I will rent out the property in part or whole to any other person. I will not encumber or part with the possession of the property to any body in any manner, nor I will rent out the property in part or whole to any other person. I will not claim any tenancy right or charge in the said property, either on the basis of the clause in the Will of Smt. Abnash Kaur or on the basis of the stand taken by me or by Smt. Abnash Kaur or by any beneficiary in any proceedings in the Courts or before the Income Tax authorities or any other authority to the effect that there was a lease in my favour with respect to the property 3 South End Road, as the said stand was taken by Smt. Abnash Kaur and by all of us in order to save her property and its income from the false claim of the step sons of Smt. Abnash Kaur.*

*e) A part of the jewellery declared by Smt. Abnash Kaur in her wealth tax*

*returns is with me, out of which I have declared some jewellery in my wealth tax returns under the Amensy Scheme. I will hand over to you all the said Jewellery for distribution amongst all the beneficiaries;*

*f) The above mentioned offer is being made by me subject to the following conditions :*

*i) That one of the beneficiaries, including you, would lay a claim or file any litigation for the share in any of the assets acquired by me in my name or in the names of the companies or in the names of my nominees or in the income of my business in India and abroad, which is as floated by me out of the estate of Smt. Abnash Kaur in my hands.*

*(ii) That you or any other beneficiary will not pursue the complaint filed by you against me with the Income Tax Department.*

*I am giving this offer in the light of the discussion which we held and in view of the serious consequences which may result if the complaint filed by you before the Income Tax Authorities is further pursued. The final settlement on the basis of the terms suggested will also avoid the litigation amongst the beneficiaries if the matter is amicably settled as it will save the estate of Late Smt. Abnash Kaur from heavy tax liabilities, penalties and payment of interest and will also save both of us from serious consequences.*

*If other beneficiaries are agreeable to these terms, you may work out the scheme to partition the estate of Smt. Abnash Kaur amongst all the beneficiaries and arrange a meeting for finalizing the settlement once for all.*

*I am giving this offer on my behalf as well as on behalf of Nina and Venu"*

14. It is submitted, that in March 1992 the Plaintiff was surprised to find fresh ongoing construction on the property. He was informed that in 1990 the Embassy had vacated the premises and that first Defendant was occupying it since then. He submits that under the conditions of the settlement, the first Defendant was to hand over possession of the property by November 30<sup>th</sup> 1992. He also alleges that alterations were being made to the property

with malafide intention and that the first Defendant had invested profits earned from the said property in her business abroad and has made huge profits. But being aware of the attitude of the first Defendant, the Plaintiff decided to file a suit which was delayed due to his ill health and finally the present suit came to be filed.

15. The first Defendant contends that suit is not maintainable. She does not dispute the following facts; that there was a duly registered will dated 8.2.1973 with six beneficiaries; the said will related to assets of the late Smt. Abnash Kaur, which were self-acquired and not part of the Seth Shiv Prasad HUF; there was a lease deed dated 18.11.1958 executed in favour of the first Defendant by late Smt. Abnash Kaur, for the said property under and by virtue of which the applicant paid a rent of Rs.500/- per month, which was later increased to Rs.1500/- per month; the above mentioned property was mortgaged by the Late Smt. Abnash Kaur to the Smt. Sushila Daphtary and her son Anil Daphtary; that the mortgages were redeemed by the first Defendant and a Court Order of February 1978 records such redemption. The first Defendant, avers that by the principle of subrogation and by virtue of her having redeemed the mortgage, she stepped into the shoes of the mortgagees; that the Defendant filed wealth tax returns declaring wealth that she had received from her in-laws; Defendant also filed Income Tax returns declaring the rent that she received from her tenant on the property.

16. The first Defendant submits that she is the owner to the extent of a one-sixth

undivided share in the property and is also a statutory tenant of the entire property. She also submits that since she became the subrogate-mortgagee in relation to the said property, the time limit for the co-owners for redeeming the mortgage has expired and subsequently her right as a mortgagee/subrogate has become absolute. She further submits that from the returns filed by her, it is apparent that she was in fact a wealthy woman by any standard. She argues that the Plaintiff has challenged these facts on the ground that they were never intended to be so. However, the challenge of the Plaintiff and the basis for such challenge is barred by law.

17. It is submitted by the first Defendant that all representations made by Abnash Kaur, and after her death by the Plaintiff in various documents and before the Court are contrary to what is being claimed by the Plaintiff herein. The first Defendant draws attention to the fact the Plaintiff is a self confessed liar and a tax evader. Further, he had himself for several years represented to the world at large, as well as to the Tax authorities, that the first Defendant is the tenant of the said property and the owner of the property and jewellery.

18. It is further submitted by the first Defendant that all reliefs prayed for by the Plaintiff are based on the above allegations. The reliefs are for recovery of possession of property from the first Defendant as her conduct has disentitled her from claiming the one-sixth ownership. Also, the basis of the plaintiff's case is that the defendant was merely a benamidar of all properties that she holds at present. The real title in such properties vested in Smt. Abnash Kaur and after her death in her legal heirs as mentioned in her will. It is submitted

that this basic averment on which the plaintiff has constructed his case is barred under the provisions of the Benami Transactions (Prohibition) Act 1988.

19. Further, the Plaintiff is now seeking to challenge a lease deed of 1958. The first Defendant submits that this is so despite the fact that the predecessor in interest of the Plaintiff, Abnash Kaur abided by the terms of the lease deed for eighteen years during her lifetime. It is submitted after her death in 1976, the Plaintiff still did not challenge the lease deed for another eighteen years. It is further submitted that the plaint does not disclose how the estate of Smt. Abnash Kaur could ever have been handled by the first Defendant and that there is no allegation to show how the first Defendant allegedly misappropriated funds from the estate of the late Smt. Abnash Kaur to develop her own business. The first Defendant further denies the existence of the Agreement of February, 1990. However, it is submitted that if it was ever was executed by the Defendant, it is bad for want of consideration, and is thus barred by the provisions of the Indian Contract Act.

20. It is further submitted that the plaint should be returned as the suit suffers from deficiency of court fee. The suit is one for possession of property at 3 South End Lane to the exclusion of the first defendant. The Plaintiff has specifically alleged that the defendant is not entitled to claim any title in the property. Thus the Plaintiff's suit is not for partition at the first instance but for possession of the property from the answering defendant. Therefore, it is submitted by the first Defendant that Court fee for this relief is thus to be paid on the market value of the property. In any case, the first Defendant avers that even if the suit be

held to be one for partition, the Plaintiff is admittedly not in possession of the property has to pay court fee on the market value of the entire property.

21. Lastly, the first Defendant avers that the Plaintiff's suit cannot be allowed in equity as it is contrary to the well-established principle that no man shall take advantage of his own wrong. The plaintiff admits to have lied to the tax authorities, and to have made certain representations to the world at large, and in a number of pleadings filed in Court. He cannot possibly be allowed to raise a plea challenging his own past conduct despite the fact that he confesses to having lied, and now after 18 years no law can allow him to take advantage of his own wrongs. Therefore, it is alleged that the Plaintiff has admitted that he has not come to this Court with clean hands.

22. Mr. CA Sundaram, learned senior counsel appearing on behalf of the applicant/ first Defendant drew the attention of this Court to several instances in the plaint where the Plaintiff admitted that there was a working and valid lease deed in favour of the first Defendant, that there was mortgage on the said property and that the first Defendant has been in possession of the property throughout. He further contended that the first Defendant has been in adverse possession of the said property from 1976 as admitted by her or at least from the date on which the compromise decree was passed in the mortgage suit, that is, 20<sup>th</sup> February 1978. He contended that the law of adverse possession required that the co-sharer enjoy the property to exclusion of the others in an uninterrupted manner. He submitted that in



the present case there had been an open assertion of hostile title and the first Defendant enjoyed exclusive possession. Even though the Plaintiff knew about the same, he had done nothing to prevent such exclusive possession nor had he claimed possession of the said property.

23. Mr.Sundaram contended that the first Defendant being in adverse possession, the Plaintiff could not now seek partition nor claim any rights. In this regard he placed reliance on the decision of the Supreme Court reported as *Shambu Prasad Singh v. Mst. Phool Kumari & Ors. (1971) 2 SCC 28*, where the Court held as follows:

*"On the question of adverse possession by a co-sharer against another co-sharer, the law is fairly well settled. Adverse possession has to have the characteristics of adequacy, continuity and exclusiveness. The onus to establish these characteristics is on the adverse possessor. Accordingly, if a holder of title proves that he too had been exercising during the currency of his title various acts of possession, then, the quality of those acts, even though they might not be sufficient to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from a person challenging by possession the title which he holds, (see Kuthali Moothavar v. Paringati Kunharankutty [1921] 48 I.A. 395, 404. As between co-sharers, the possession of one co-sharer is in law the possession of all co-sharers. Therefore, to constitute adverse possession, ouster of the non-possessing co-sharer has to be made out. As between them, therefore, there must be evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other. (see Lakshmi Reddy v. Lakshmi Reddy [1957] S.C.R. 195, 202 and also Mohammad Baqar v. Naim-un-Nisa Bibi. A.I.R. 1956 S.C. 548) But, once the possession of a co-sharer has become adverse as a result of ouster, a mere assertion of a joint title by the dispossessed co-sharer would not interrupt the running of adverse possession. He must actually and effectively break up the exclusive possession of his co-sharer by re-entry upon the property or by resuming possession in such a manner as it was possible to do. (see Wuntakal Yalpi*

*Chanabasavana Gawd v. Y. Mahabaleshwarappa* [MANU/SC/0117/1954](#)). The mere fact that a dispossessed co-sharer comes and stays for a few days as a guest is not sufficient to interrupt the exclusiveness or the continuity of adverse possession so as not to extinguish the rights of the dispossessed co-sharer, (see *Ammakannu Ammal v. Naravanaswami Mudaliar* A.I.R. 1923 Mad. 633)."

24. Mr. Sundaram also submitted that for the purpose of proving adverse possession it is not necessary that the claimant himself has to be physical possession; it is sufficient that the claimant be in constructive possession of the property in question. The attention of this Court was drawn to the rulings in *Chandrakantaben v. Vadilal Sapalal Modi*, (1989) 2 SCC 630 and *Raju Naicker v. Ekanathan*, AIR 2004 Mad 465. He also relied upon the decision reported as *Mt. Bolo Vs. Mt. Koklan & Ors.* AIR 1930 PC 270 to contend that the right for partition by a co-owner has to be exercised within three years of denial of such right or ouster as per Article 113 of the Limitation Act. Going by the Plaintiff's prayer for rendition of accounts, Mr. Sundaram contended, the denial of such right or ouster of constructive possession occurred the very least in 1980, and that the present claim was filed after a delay of about thirteen years. It was further urged that even if the Plaintiff were to claim as a legatee under the will, the right had to be claimed within 12 years from when the legacy or share becomes payable or deliverable. He placed reliance on the decision reported as AIR 2006 HP 103 *Mohinder Lal & Ors. Vs. Tule Ram & Ors.*

25. Mr. Madan Bhatia learned counsel appearing on behalf of the Plaintiff drew the

attention of this Court to the order dated 1<sup>st</sup> December 2004, where the Court held that on a prima facie view of the will dated 6.2.1973, the parties are entitled to 1/5<sup>th</sup> share in the property (given that one of the defendants died without leaving any legal heirs). It also held that the position of the first Defendant as being the lessee of the said property was under serious challenge for a number of reasons, and most notably for the fact that if Abnash Kaur were herself in financial difficulties, it would be highly unlikely that she would lease the property to the first Defendant for a sum of Rs. 500 and not directly lease for a higher sum. These findings in the interlocutory stages, Mr. Bhatia contended, operated as *res judicata* and cannot be agitated again. He placed reliance on decision of the Supreme Court in *Arjun Singh Vs. Mohindra Kumar & Ors.* AIR 1964 SC 993.

26. From the above discussion, what emerges is that the Plaintiff seeks reliefs on the basis of his being a legatee to the will of late Abnash Kaur. He also alleges that the lease of property made in 1958, to the first Defendant was a sham transaction. The late owner, Abnash Kaur kept quiet in her lifetime; the challenge was more than 18 years later. The defendants also submit there was no question of joint status, as she had paid off the mortgage loan in 1978. Had the Plaintiff wanted to assert his rights, he should have asserted it within reasonable time. The ground on which the suit is sought to be rejected is that the plaint does not disclose a triable cause of action and is barred in law.

27. No doubt, reliefs such as declaration about the true status of documents, returns filed before statutory authorities etc, have to be claimed with diligence, as the prescribed limitation is three years from the alleged cause of action. In that sense, limitation has to be claimed from the point of time when the denial, or the cause arose. However, both the Plaintiff and the first Defendant claim to be owners of the property on the basis of a registered will. The first Defendant herself claims to be one-sixth owner. Her claim for exclusive right is that if the Plaintiff wanted to claim a share, they should have sued for partition within time.

28. In *Bindhyachal Chand v. Ram Gharib Chand* (AIR 1934 All 993), a Full Bench of the Allahabad High Court examined the difficulties which arise when a co-sharer sues another on the allegation that he had been dispossessed. It held that:

*“No doubt in many cases the distinction is very fine, and the line of demarcation between dispossession and **adverse possession** is thin. But, the question in each case is one of burden of proof, and it is incumbent on the plaintiff, when he admits his dispossession, to establish his possession within twelve years...”*

It was also held that:

*“Ordinarily, the possession of one co-owner, who is entitled to joint possession of the whole property, is referable to his title, and he cannot ask the Court to presume that his **possession was illegal or adverse** to the other co-owner. It follows that if one co-owner is in actual possession of the joint property, and the other co-owner is either absent or is not in actual possession, the latter would still be in constructive possession of his property through his co-owner. There would be prima facie no case, where the **possession of one co-owner was illegal and was, necessarily adverse** to that of the other co-owner. The presumption would be that they are both in joint possession”*

In a similar vein, in *Karbalai Begum v. Mohd. Sayeed*, (1980) 4 SCC 396 it was held that:

*“It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact be admitted, then the legal position would be that Mohd. Bashir and Mohd. Rasheed, being co-sharers of the plaintiff, would become constructive trustees on behalf of the plaintiff and the right of the plaintiff would be deemed to be protected by the trustees.”*

29. In the recent judgment of the Supreme Court, in *Govindammal v. R. Perumal Chettiar*, (2006) 11 SCC 600 the law was further explained in the following terms:

*“no hard-and-fast rule can be laid down from which it can be inferred that any co-sharer has ousted his co-sharer. That will depend upon facts of each case. Simply long possession is not a factor to oust a co-sharer but something more positive is required to be done. There must be a hostile open possession, denial and repudiation of the rights of other co-owners and this denial or repudiation must be brought home to the co-owners. Simply because a co-sharer gave notice claiming partition of the suit properties and possession and did not pursue the matter further, that will not be sufficient to show that the co-sharer has lost his/her right.”*

30. The Defendant applicants do not deny about the existence of the will, in which they and the Plaintiff are entitled to one sixth shares; the plaintiff alleges that the defendant started to receive rents from the entire property without accounting for it; and that a letter was written by the latter, offering to settle all disputes. The first Defendant disputes these

averments; the Plaintiff has also asserted that he is in constructive possession. At this stage, the Court's scrutiny, however, is confined to plaint averments and the list of documents filed with the suit.

31. While considering whether an application for rejection of the suit is well founded, the court has to consider the plaint averments as a whole (See *Raptakos Brett & Co. Ltd. v. Ganesh Property*, 1998 (7) SCC 184.). It is also an established principle that only a part of the plaint cannot be rejected and if no cause of action is disclosed, the plaint as a whole must be rejected (*Roop Lal Sathi v. Nachhattar Singh Gill*, 1982 (3) SCC 487). It was observed by the Supreme Court, in *Popat and Kotecha Property-vs-State Bank of India Staff Association* 2005 (7) SCC 510) that the averments in the plaint as a whole have to be seen to find out whether Clause (d) of Rule 11 of Order 7 was applicable.

*“18. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.”*

32. In this case, even if some of the causes pleaded by the suit are seemingly barred, yet this court should not reject the plaint on the ground of the relief being time barred. The

question of constructive possession, being an answer to the defendant's argument about their adverse possession, the will conferring rights on many people and the Plaintiff's claim being founded on an alleged admission of the first Defendant, all point to the fact that neither can it be said that the plaint does not disclose a cause of action; nor can it be said, without going into rival versions, and permitting parties to lead evidence, that all claims are time barred.

33. In view of the above discussion, this application has to fail; it is dismissed.

Dated : 7th April, 2008

(S. RAVINDRA BHAT)  
(JUDGE)